

BEHIND THE SCENES OF THE JUDICIAL REVIEW

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Contents: The Judicial Review: the pride and enigma of Americans. Antecedents of State Courts and the U.S. Supreme Court prior to *Marbury v. Madison*. The meaning for the Brazilian constitutional law. The *nomoi* and the *psefismata* of Ancient Greece. The Interpretation of Art. III of the American Constitution. The teaching of *Publius* (Hamilton). Appointments of Federalist judges and the Judiciary Act of 1802. A recess imposed by the Anti-federalist Congress on the U.S. Supreme Court. Fights behind the scenes. John Marshall's dilemma: impeachment or submission.

Certainly one of the favorite themes of current constitutional law is the *Judicial and Administrative Acts Control*. In spite of that, a lot of today's debaters, whether in judicial courts or even in law schools, have no idea of the struggles that occurred in the United States in the dawn of XIX century in order to establish this fundamental principle of any modern democratic government.

Now, about two centuries later, we listen to Ronald DWORKIN (2000, p. 41) to say, with authority, that the *Judicial Review* is “the pride and the enigma” of the Americans. Indeed, it is. But in order to understand this *pride and enigma*, it's necessary to turn to some dusty pages of the political history of the United States. We need to penetrate deeply into the mind of the American judges who are impregnable with common law. We need to weigh the coup and anti-coup against the “weakest of the three Powers” of this country.

An American judge, federal or state, has a historic background very diverse from that of a Brazilian judge. His/her background is common law, precedents, and the *stare decisis*. In the beginning of the country's legal-political consolidation, many people without a professional education

occupied high jobs in the Judiciary. Law wasn't a professional monopoly (See MAYERS, 1955, p. 349). Evidently, this influenced the formation of the American judge and, consequently, American law itself. Another divergent point in relation to Brazilian law (which belongs to the Roman-Germanic family) lay in the great number of judicial state systems in America. Each state has its own law, despite the interchanges or imitations among many of them.

The classic case of judicial review, that got the whole world, was *Marbury v. Madison*, 5 U.S. (1 Cranch 137 (1803)).

Why is *Marbury v. Madison* so important? Today, the answer is clear and immediate: in a written Constitution, the power to control the constitutionality of the other powers acts must belong to only one of these powers. To the contrary, what is a written Constitution? It isn't necessary, of course! And of the three traditional Powers, the Judicial Branch – which was *practically null*, as MONTESQUIEU (1996, p. 172)¹ said – is the most indicated to control the stronger ones.

Since when the Ionic seed fertilized the Attic land and produced the Western Civilization, one could understand clearly that a society, even though a small one as a polis, could only prosper and bring happiness to its citizens if there were fixed rules or rules to be altered with difficulty.

It is useful to remember that in Greece, Athens in particular, there was a distinction between *nomoi*, with their constitutional nature, and *psefismata*, the decrees. The *nomos*, that had divine origin, superior and thus, prevailed over the *psefisma*. In France's *Ancien Régime*, the *lois fondamentales du royaume* prevailed over the *lois du roi* (See CAPPELLETTI, 1984, p. 49, 54 and 55). The same thing occurred in the Realm of Aragon (See FAIRÉN-GUILLÉN, 1969, t. 1, p. 134).

¹Of the three Powers, the power of judging is, someway, null.

Even in England, during the colonization of the United States, *sir* Edward Coke (1552-1634), judge, philosopher and politician, chief justice of the Court of Common Pleas,² when deciding the case of a doctor (Thomas Bonham) who was arrested by his class corporation order, said that the statute of the medical entity was void and null, since it was against the law (common law): *the law was over the king and the Parliament*. The task of the judge, then, was to nullify any provision contrary to the law. Coke's *Institutes*³ which were brought to America by the Mayflower pilgrims (1620) were read by all zealous lawyers on both sides of Atlantic Ocean. Thus, the theory of judicial review was, say, in the "blood" of any American who worked with law. Even John Marshall himself, when he was a Virginian conventional delegate for the ratification of the national Constitution, emphasized that any act contrary to the Constitution ought to be declared "null and void" (See SCHWARTZ, 1993, p. 12).⁴ Finally it's important to remember that Alexander Hamilton (1755?-1804) in the Federalist Paper nr. 78 advocated the role of the Judicial Branch as the guardian of the Constitution:

This simple view of the matter suggests several important consequences. It proves incontestably, that the judiciary is beyond comparison the weakest of the three departments of power⁴; that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks.

And Hamilton carries on:

² The English Court of Common Pleas appeared in the end of century XII. In century XV, its importance was expressive indeed. In 1873, the Judicature Act was profoundly altered. Before the 1873 reform, the Court consisted of a chief justice and five associate justices (*puisne judges*).
http://en.wikipedia.org/wiki/Court_of_Common_Pleas. Access on: September 10, 2008.

³ Even today, Coke's *Institutes*, such as the works of Bracton and Blackstone, are considered "sources of law" in England (See ZITSCHER, 1999, p. 82)

⁴ It is worth remembering that John Marshall, in a Virginian case -*Ware v. Hylton* -, maintained a different point of view: a judge had no authority to question the will of law (See SCHWARTZ, 1993, p. 22).

Some perplexity respecting the rights of the courts to pronounce legislative acts void, because contrary to the Constitution, has arisen from an imagination that the doctrine would imply a superiority of the judiciary to the legislative power. It is urged that the authority which can declare the acts of another void, must necessarily be superior to the one whose acts may be declared void. As this doctrine is of great importance in all the American constitutions (...).

.....

Whoever attentively considers the different departments of power must perceive, that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.⁵

The 1776 American revolutionaries, when they created a new State, made the option for a written document (the Constitution), a document that could really protect them against any occasional political storms. But this new document didn't expressly expose which department of power was incumbent on the task. Some states of the former Confederation had truly chosen their judiciaries to realize this fundamental work.

In juridical hermeneutic, it's elementary that an interpreter must always start according to the text of the law, in spite of the fact that he is never bound to its exact letter. And the American Constitution, in the article dedicated to Judicial Power (Art. III), doesn't expressly mention that the task of judicial control is reserved for the federal magistrates. The said Article occupies itself only with the creation of "one supreme court". Then, it leaves the establishment of the "inferior courts" to Congress. Art. III, Section 2, points out the competence of the Judicial Department: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution". The same judging mission was conferred to state judges by the second clause of Art. VI.⁶ All

⁵ <http://www.constitution.org/fed/federa78.htm>. Access on: May 27, 2012.

⁶ *This Constitution, and the Laws of the United States which shall be made in Pursuance thereof and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws or law of any State to the Contrary notwithstanding* (See TEDESCHI, JR, Robert F. (text). *The constitution and fascinating facts about it*. 5. ed. Oak Hill Publishing, 1995).

these constitutional dispositions were in their totally enough to conclude that the role of exerting the judicial review was given to the Judiciary.

Before *Marbury's* opinion (February, 1803), some state courts had declared null laws with the argument that they were contrary to the respective constitutions. We can mention, as exemplification, a 1780 Supreme Court of New Jersey decision: *Holmes v. Walton*. A second case came from the Court of Appeals of Virginia (*Commonwealth v. Caton*). Another one, from North Carolina: *Bayard v. Singleton*. This last case was sentenced few months before the proclamation of the U.S. Constitution. Even the U.S. Supreme Court, before John Marshall's oath (February 2, 1801), had applied the judicial review principle. In 1795, Justice William Paterson (1745-1806), in the case *Van Horn's Lesse v. Dorrance*, 2. U.S 304 and Justice Samuel Chase (1741-1811), in *James Callender Case*,⁷ maintained the prevalence of the Constitution (GERBER, 1998, p. 10). In *Ware v. Hylton*, 3. U.S. 3 Dall. 199 (1796) Justices Chase, William Cushing (1732-1810), Paterson and James Wilson (1742-1798) proclaimed unconstitutional an act of the state of Virginia (See GERBER, 1998, p. 11). But there's no doubt that only with *Marbury v. Madison* was it said clearly and *didactically*, that the main role of controlling the constitutionality of laws and administrative acts belonged to the judicial courts.

The "Framing Generation" – as Professor David J. BEDERMAN (2008, p. 1) says – that is, the generation of patriots who comprised the First Continental Congress, and wrote the Declaration of Independence, the Constitution and the Bill of Rights – was composed of two political factions: Federalist and Anti-Federalist. The Federalists (Washington, Adams, Hamilton) were for a strong central government; the Anti-Federalists (Jefferson, Henry, Mason, Burr) were for more expressive state autonomy. They fought for the preservation of the citizens' fundamental liberties. With Washington's refusal of a third term of government, his vice, John Adams (1735-1826), was elected president of the Republic (1796). Despite his bad government, Adams disputed the next term. He lost to Jefferson/Burr. The Federalists, with the overwhelming victory of Jefferson, tried to make the federal Judiciary a real

⁷ James Callender (1758-1803) was a Scotch political journalist who fled to America. Many times he used his poisonous pen to blackmail and commit political hearsay. He attacked Hamilton's honor, stating that he had an amorous case with a married woman. In September 1802, Callender published a series of articles against President Jefferson, his former protector. He said that Jefferson lived illegally with his slave (Sally Hemings) with whom he had several children. Alcoholic, he put an end to his own life by jumping into an icy river. (<http://www.monticello.org/site/research-and-collections/james-callender>. Access on: April 10, 2011).

“beachhead”, since they had lost both the Presidency and Congress (majority).⁸ Before the new legislature was sworn in, the lame-duck Congress in order to rapidly approve a modification of the Judiciary Act of 1789 as follows: four new circuits and fourteen offices for Justices of the Peace were created for the District of Columbia. Then, new congressmen arrived with their Anti-Federalist majority. In March 1802, this new Congress made a new Judiciary Act nullifying the former appointments of the “midnight judges”, as Jefferson ironically termed them. The Anti-Federalist took an audacious step, a true legal violence: the U.S. Supreme Court would be in recess until the next first Monday of February, 1803.

Practical and theoretic questions then came up: could the new Legislature nullify the former appointments, since they were made according to valid law (Judiciary Act of 1801)? Wasn't the (federal) judge in office “during good behavior” so, he couldn't lose his public job.

Two judicial suits were filed: one by *Marbury* and his companions directly in the Supreme Court; the other one, by John Laird in a Virginian court. In both cases the counsel of the Federalists was the famous Charles Lee (1758-1815), former United States General Attorney.

After the end of the punishment imposed by Congress (recess), the Supreme Court, on February 24, deemed *Marbury v. Madison*, as was said before. The Court, then, had as Chief, John Marshall and as Associate Justices, William Cushing, William Paterson, Samuel Chase, Bushrod Washington and Alfred Moore. Cushing and Moore were absent on judgment day.⁹ A week later, on March 2, 1803, the time of *Stuart v. Laird*, 5 U.S. 299 (1 Cranch) 299 arrived. In this second case, Marshall remained out, but behind the scenes... William Paterson formally took Marshall's chair.

With the other two Powers united against the Supreme Court, its judges were in jeopardy. Impeachment loomed.¹⁰ For the Court there was only one way to follow: to consider valid the Repeal Act of 1802, even though they could be deemed cowards and pusillanimous. At this exact moment, all the sagacity and acumen of John Marshall appeared.

⁸ Georges BURDEAU (t. III, 1950, p. 380) observes that the judicial control in America wasn't only an instrument to correct formal legislation, but, above all, an instrument of censure to the acts of Congress. After Jefferson's election, the Federalists were afraid of the possibility of the destruction of the political edifice they had constructed with difficulty. That explains the “midnight appointees” at the end of Adam's government.

⁹ <http://en.wikipedia.org/wiki/Marbury-v.-Madison>. Access on: April 17, 2011.

¹⁰ Thomas Jefferson sent an official letter to the House of Representatives, urging John Pickering's impeachment. Pickering was a Federalist Circuit judge.

The two judgments – *Marbury* and *Stuart* – were true works of political engineering which reflected the sagacity and quirks of Marshall, certainly the greatest figure of the American Judiciary.

The first suit - a mandamus – was filed directly in the Supreme Court by William Marbury and others. Its goal was to force the Secretary of State (Madison) to give them back the nomination documents. The legal basis of the judicial action was Art 13 of the Judiciary Act of 1789.

Marshall tried, in a Cartesian way, to divide the problem into three main parts: a) Did the plaintiffs have the right to the office? “Yes”, was Marshall’s answer; b) Did the law of the land give a legal remedy to solution of the case? His answer was affirmative, too; c) Did the Court have the capacity to judge the case? “No”, replied the Chief.

Marshall repeated the phrase that comes from the Roman jurist Cicero (106-43 BC) and Edward Coke: Our government is “a government of laws and not of men”. If the greatest law of the Land is the Constitution, the inferior laws – the Judiciary Act – must operate according to it.

A year after the *Marbury* opinion, the Jeffersonians filed in the House of Representatives an “Article of Impeachment” against Justice Samuel Chase, a militant Federalist. Fatally Chase would be condemned in the Senate. But he was saved by the last events involving the Jefferson Republicans of and the opportunity that the Senate chairman, Vice-President Aaron Burr (1756-1836), gave to his defense. One vote saved Samuel Chase, then.¹¹

As was said before, *Marbury v. Madison* was judged in 1803. This landmark made it possible for the Judiciary to revise acts of the both Powers, Executive and Legislative. For some scholars, the question was so pacific and consensual among the 1787 Convention delegates that it wasn’t expressly inserted into the new political Document. Anyway, Jefferson, in an ironic manner, termed the appointments made at night as “midnight appointments” (See PADOVER, 1944, p. 127). Only in 1857, with the opprobrious *Dred Scott v. Sandford* Case, did the Court declare unconstitutional another federal act. In two other cases – *Martin Hunter’s Lessee*, 14 U.S. (1 Wheat) 304 (1816) and *Cohens v. Virginia* 19 U.S. (6 Wheat) 264 (1821) -, the Court established its capacity for revising cases judged by state courts (See CHEMERINSKY, 1997, p. 44). As a matter of fact, the first state case judged by the Supreme Court came from 1810:

¹¹ <http://www.michaelariens.com/ConLaw.aw/Justices/chaseam.htm>. Access on: August 10, 2006.

Fletcher v. Peck. As observed by NOWAK and ROTUNDA (2007, p. 8), the importance of this judgment remains in the fact that from 1803 on, the Court could nullify state courts opinions. In the real case, a Georgia legislative act considered null the transference of public lands on the suspicion of fraud. In the U.S. Supreme Court, the justices said that the purchasers were *bona fides*. Then the state of Georgia had the responsibility for the public transaction. The universal principle of *pacta sunt servanda* was applied also in the public contract celebrated between the administration and common people. That was the reason for the unconstitutionality of the state act.

According to the federate principle, a state supreme court is at the same level as the Supreme Court of the United States. Both – the supreme court of a state or the Supreme Court of the United States – judge in the last instance. By the diffuse judicial system, the state courts – as occurs in Brazil¹² - have the competence of judging the state administrative acts or state laws. But they can't act against the U.S. Supreme Court in the interpretation of the National Constitution or federal acts. However, the state legislator can give more individual rights than the federal one. There're peculiar cases (See NOWAK and ROTUNDA, 2007, p. 12). In one of them, a state supreme court, based on Amendment 8, considered unconstitutional a law that established capital punishment. If the state supreme court considered unconstitutional law, it was simply acting against the U.S. Supreme Court. But, if a state supreme court declares the unconstitutionality based in the state constitution, its opinion will be valid.

With *Marbury*, the U.S. Supreme Court definitely supported the capacity of the Judicial Power to confront the acts of the Executive and Legislative branches according to the Constitution. Marshall's escape was simply genial. Nevertheless, according to the hermeneutic point of view, the Art 13 of Judiciary Act of 1789 would head the interpreter in another direction. Anyway, besides, Marshall's step was a step of a genius.

The meaning of John Marshall for the political consolidation of the United States was immense. When John Quincy Adams (1767-1848) received news of Marshall's death, he lamented:

By the ascendancy of his genius, by the amenity of his deportment, and by the imperturbable command of his temper, has given permanent and systematic

¹² The first Brazilian Republican Constitution (1891) adopted the judicial review as the Americans did. Later, our system became mixed. Today we have a blended system: diffuse and concentrated control (See COLE, 2006, p. 17).

character to the decisions of the Court, and settled many great constitutional questions favorably to the continuance of the Union (SCHWARTZ, 1993, p. 33).

In January 1833, about two years before Marshall's death, JOSEPH STORY (1779-1845), in his notable work *Commentaries on the Constitution of the United States* (1970, v. 1), pointed out in the dedication to the former colleague:

Posterity will assuredly confirm by its deliberate award, what the present age has approved, as an act of undisputable justice. Your expositions of constitutional law enjoy a rare and extraordinary authority. They constitute a monument of fame far beyond the ordinary memorials of political and military glory. They are destined to enlighten, instruct, and convince future generations.

The great French constitutionalist Édouard Laboulaye (1868, p. 488), in turn, said in the chapter dedicated to the American Judiciary:

Marshall, qui fut nommé chef justice in 1801, et qui mourut in 1835 dans un âge très-avancé, était de cette école fédéraliste à laquelle appartenait Washington, Hamilton et les patriotes qui voulaient l'unité nationale et la toute-puissance de la constitution. Pendant trente-cinq ans, il fut donc donné à John Marshall d'interpréter la constitution dans le sens de l'unité contre toutes les tentatives faites pour rompre le lien fédéral.

C'est là un service immense, car, si l'Amérique est engagée dans une lutte terrible, c'est que depuis soixante-quinze ans elle a souvent trouvé parmi les présidents des États-Unis des hommes qui se sont donné la tâche d'amoindrir le bien fédéral, d'affaiblir l'unité.

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